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FEDERAL EXPRESS
Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-0609

RE: SR-FINRA-2007-021
Comment re: Proposed Rules for Dispositive Motions in FINRA Arbitrations

Dear Ms. Morris:

Pursuant to SEC Release 34-57497 I wish to comment on proposed amendments to FINRA Rules 12206 and 12504 in regard to motions to dismiss. I have been privileged to represent member firms and the financial industry along with their employees both in court and in FINRA (previously NASD and NYSE) arbitration proceedings for many years. I am a former member of the NAMC and former Deputy General Counsel at PaineWebber.

We believe the amendment as presently proposed is unfair, overly broad and will result in further "unleveling" of the playing field and unnecessary cost to the industry and to Claimants. We oppose their approval.

THE PREMISES OF THE RULE ARE ERRENOUS

The assumption that motions to dismiss are being made by some parties with increasing frequency, sometimes repetitively, and with little chance for substantive

success, has not been quantified or established. Any remedy should deal with actual abusers, not the process. Moreover, even denied motions may serve valid purposes for all parties, narrowing issues, educating the Panel, evaluating settlement value and focusing on disputed areas. None of this has been considered.

We also note in the commentary supporting the amendments conflicting experience. One commentator decries the declining win/loss ratio which the writer attributes to the rise in number and to the granting of dispositive motions. Yet another asserts that such motions are generally denied, and thus were brought only to increase costs and delay hearings. Motions that are granted by a panel are not "abusive". Meritorious dispositive motions should not be barred. Baseless motions can be dealt with appropriately.

It is clear that some portion of the claimant's bar seeks to deny respondents any opportunity to achieve early dismissal of bogus claims. This is due to the obvious tactical advantages to extort settlements that result when an expensive hearing is forced on every occasion. Respondents will be required to incur the significant costs of attorneys' fees, distant travel and lodging, lost income, and the lost services of valuable employees that will be required for days and days of hearings, all involving a case that logically and justifiably will be dismissed at the end of days or weeks of hearings, even though the case would likely have been dismissed upon a properly lodged, opposed, and argued motion months before. The amendment's creation of significant "settlement value," in every instance, and with no relation whatsoever to merit, serves no valid purpose. The amendments' most assured result will be a tidal wave of meritless claims filed only to extort the necessary defense costs from respondents.

The requirement that almost all motions be made only after the claimants' case presentation creates great difficulties, both in logic and in expense. The purpose of a dispositive motion is to forego and to avoid the substantial expense of defense preparation and attending the hearing. To make the motion only after days or weeks of claimants' case presentation all but nullifies the dismissal motion's most important objective. Not only are all defense costs incurred and imbedded before the motion is made, respondents still must incur the entire cost of case preparation and must be fully prepared to proceed if the motion is not granted. Nothing has been saved in such cases.

THERE IS NO MORE "RIGHT" TO AN ARBITRATION HEARING THAN THERE IS A "RIGHT" TO A TRIAL

FINRA representatives have stated that a guaranteed hearing is a "fair" trade-off for claimants' loss of the right to a jury trial. This contention is flawed. There is no "right to trial" with regard to cases that are time-barred (statutes of limitation), that have already been heard in another forum (res judicata, collateral estoppel), that have already been amicably resolved (settled, with releases exchanged), where the allegations cannot be proved or can be disproved (summary judgment) or where the allegations simply do not add up to an entitlement to any recovery (failure to state a claim).[1] These are just a few instances where all courts throughout this country invariably permit a defendant to bring an appropriate motion to demonstrate to a court why a trial on the issues is appropriate, unwarranted and perhaps even unjust. There is no valid reason for these procedural safeguards to be denied in arbitrations generally, much less only in FINRA arbitrations. Every federal court addressing this issue has approved dispositive motions

[1] The amendment would allow a dispositve motion based upon a signed release, but not a prior judgment or even a prior arbitration award.